

***United States Court of Appeals
for the Second Circuit***



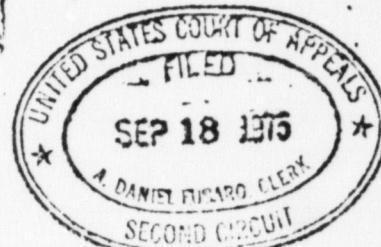
**INTERVENOR'S
REPLY BRIEF**

75-6007

C 14

Reply Brief
UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of September, one thousand nine hundred and seventy-five.

United States of America,
Petitioner-Appellee,
v.
First National City Bank and Chemical
Bank New York Trust Company,
Respondents,
First National City Bank,
Respondent-Appellant,
and
Milton F. Meissner,
Proposed Intervenor-Appellant.

B
P/L

It is hereby ordered that the motion made herein by counsel for the

Milton F. Meissner
appellant / appellee petitioner respondent

by notice of motion dated September 15, 1975 for leave to have designated and filed as a reply brief four copies of a brief previously filed (7-10-75) in opposition to appellee's motions to dismiss the appeals as moot

be and it hereby is granted ~~denied~~

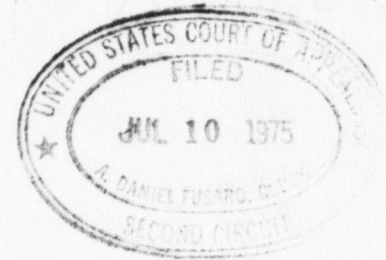
GRANTED.

MURRAY I. GURFEIN

Circuit Judges

15-6007
15-6008

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NOS. 75-6007, 75-6008



UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

FIRST NATIONAL CITY BANK,
Respondent-Appellant,

CHEMICAL BANK NEW YORK TRUST CO.,
Respondent, B

and

MILTON F. MEISSNER,
Proposed Intervenor-Appellant. L

APPEAL FROM ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK IN CIVIL ACTION M 18 304

BRIEF FOR PROPOSED INTERVENOR-APPELLANT
MILTON F. MEISSNER IN OPPOSITION TO
APPELLEE'S MOTIONS TO DISMISS THE
APPEALS AS MOOT

R. KENLY WEBSTER
KENNEDY & WEBSTER
888 17th Street, N. W.
Washington, D. C. 20006
(202) 298-8208

NEAL J. HURWITZ
745 Fifth Avenue
New York, New York 10022
(212) 755-4300

To be argued by
R. Kenly Webster

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x

UNITED STATES OF AMERICA,	:	
Petitioner-Appellee,	:	
v.	:	Docket No. 75-6007,
	:	75-6008
FIRST NATIONAL CITY BANK,	:	
Respondent-Appellant,	:	
CHEMICAL BANK NEW YORK TRUST CO.,	:	
Respondent,	:	
and	:	
MILTON F. MEISSNER,	:	
Proposed Intervenor-Appellant.	:	
-----	:	x

MEMORANDUM OF LAW

Statement of the Case

This case involves an appeal from the District Court's Orders denying Dr. Milton F. Meissner the right to intervene in proceedings below in which the Government, based on a jeopardy assessment, petitioned and obtained court orders permitting it "to seize and obtain any property or rights to property belonging to the taxpayer" contained in two safe deposit boxes leased to Dr. Meissner by First National City Bank ("Citibank") and Chemical Bank New York Trust Company, respectively. A full brief on the merits was filed on behalf of Dr. Meissner on June 5, 1975 which contains a more detailed statement of facts.

POINT I

THESE CASES ARE RIPE FOR DETERMINATION
BY THIS COURT

A. Neither Of The Appeals Is Moot.*

In his brief on the merits submitted to this Court in these appeals, Dr. Meissner respectfully has requested that "the judgment of the District Court should be reversed, the petitions dismissed, and all property seized from the two safe deposit boxes returned". Clearly, these appeals are not moot for purposes of such requested relief.

Since the Government has obtained custody of the contents of one of the safe deposit boxes and knowledge of the contents of both boxes by virtue of the proceeding below, this appeal is the proper vehicle for challenging the validity of that proceeding and, if invalid, compelling the return of the property seized as well as preventing the use by the Government of any knowledge gained thereby.** In his brief on the merits,

* The brief on the merits filed on behalf of Dr. Meissner on June 5, 1975 in 75-6007 states his position with respect to 75-6008 as well.

** See F.T.C. v. Browning, 435 F.2d 96, 97-8, FN.1 (D.C. Cir. 1970) where the court rejected the Government's contention of mootness in an appeal from the enforcement of a subpoena after the Appellate Court refused to grant a stay. The Court stated "We decline to dispose of this case on the ground of mootness, however, because, among other things, the records are still in the government's possession and thus if they were wrongfully subpoenaed, Browning would be entitled to their return." Ibid.

Dr. Meissner has challenged the search and seizure of the boxes on constitutional and other grounds.

Ironically, the Government urges that the appeals are moot because the "interim relief" has been obtained, namely, that the knowledge of the contents of the safe deposit boxes which it has obtained "cannot be erased". Memorandum of Law of the United States of America, filed June 26, 1975 in 75-6007 and 75-6008, pp. 11-12 (hereinafter referred to as "Government's Memorandum of June 26, 1975"). Furthermore, the Government admits that it took possession of the contents of the Chemical box and seeks possession of all of the contents of the Citibank box, acts which flatly contradict previous statements made to this court. See Argument II A, infra.

It is long established that the Government is barred from using property and knowledge obtained in violation of the Constitution or existing statutes and must return the property. The rule applies to civil suits and to the interests of all individuals "whether accused of a crime or not". Weeks v. United States, 232 U.S. 383, 391 (1914); see also One 1958 Plymouth Sedan v. Penna., 380 U.S. 693 (1965); Pizzarello v. United States, 408 F.2d 579, 586 (2nd Cir. 1969).

Thus, the I.R.S. has been barred from using evidence seized in violation of Fourth Amendment rights to support an assessment and levy, see United States v. Blank, 261 F. Supp. 180 (N.D. Ohio, E.D. 1966). In January of this year the Supreme Court specifically held that a person may invoke Fifth Amendment rights in a civil case because these rights would not be adequately protected in a subsequent criminal proceeding. Maness v. Meyers, 43 U.S.L.W. 4143 (Jan. 15, 1975).

It is clear, therefore, that merely because the Government has obtained knowledge or seized property, a case does not become moot when the validity of the Government's actions is challenged as has been done here.

B. The Order Affecting The Citibank Box
Is A Final Order And Is Appealable

The Government does not contest the fact that the Order affecting Chemical Bank is final and appealable by statute and court rules.* It asserts, however, that a similar Order relating to Citibank is not final because Citibank has raised a question concerning the meaning of the term "possession"

* See 28 U.S.C. 1291; Rule 3 Fed. R. App. P.

in that Order. However, Dr. Meissner's Motion for Intervention in the Citibank Proceeding was denied and his proffered arguments opposing the petition were rejected; and none of the issues raised by Dr. Meissner on appeal are affected by the interpretation of the meaning of the word "possession". Furthermore, the Government concedes that it may seek in any event to resolve the question with respect to the meaning of "possession" in a separate proceeding below.

Since (1) the appeal from the Chemical Order is undeniably ripe for determination, (2) the same issues are raised with respect to the Citibank Order, (3) the Citibank Order may never be interpreted by the District Court and (4) any interpretation of Judge MacMahon's Citibank Order will not affect the issues already presented in full briefs submitted by Dr. Meissner and Citibank on appeal, this matter should now be addressed on the merits by this Court.*

* This Court has observed that a final decision for purposes of jurisdiction of appeals from final decisions of Federal District Courts does not necessarily mean the last order possible to be made in the case. Eisen v. Carlisle and Jacquelin, 370 F.2d 119 (2nd Cir. 1966), cert. denied, 386 U.S. 1035 (1967).

C. Dr. Meissner Has Standing To
Be Heard In These Appeals.

Appellee argues that Dr. Meissner is a "fugitive from justice" and therefore should not be heard to assert constitutional or other arguments. This contention is inaccurate and without legal merit.

It is inaccurate because Dr. Meissner has been a non-resident of the U. S. since June, 1970, long before the jeopardy assessment, which serves as the basis for the petitions in this case, was made in April, 1974. At no time can Dr. Meissner be said to have fled the country. Furthermore, while Dr. Meissner failed to respond to a subpoena served extraterritorially while he was abroad in March, 1974, there are serious constitutional questions involving the procedures utilized. Although the statute under which he was served provides only for civil penalties, a bench warrant was issued for him. However, he has not been charged with a crime and, contrary to the implications in the Government's brief (See Argument II B infra) he has not been held in contempt of court.

The cases cited by the Government in its brief on pp. 19-20 in support of its argument are inapposite because

they deal with convicted or indicted defendants, a circumstance not present here, and because they require that the violation of law be connected with the very transaction which is the subject of requested legal redress*, a circumstance also not present here. Furthermore, even if Dr. Meissner were to be considered a fugitive criminal defendant, it would not deprive him of the right to assert defenses in court, as this Circuit recently held in a criminal case. See United States v. Weinstein, No. 74-2595, p. 15 (2d Cir. January 30, 1975).

The Government also asserts that existing law bars Dr. Meissner from asserting Fourth and Fifth Amendment rights through his attorney in this civil case. This argument, however, is irrelevant because Dr. Meissner has not been permitted to intervene in the proceeding below and thus has not had an opportunity to personally invoke his constitutional rights (See Argument II E, infra), even assuming the doubtful possibility that there is such a legal requirement. Therefore the Government's arguments to deny Dr. Meissner standing to appeal in this case are spurious, factually inaccurate and legally insufficient.

* See, e.g., United States v. Toscanino, 500 F.2d 267, 274 (2d Cir.), rehearing en banc denied, 504 F.2d 1380 (1974).

II. MISREPRESENTATIONS BY THE GOVERNMENT

A. Which Of The Following Government Statements Is To Be Believed?

In April 1975 the Government stated:

"On October 4, the Government filed duplicate petitions...for the sole and limited purpose of learning about the contents of the safe deposit boxes." (emphasis added). Brief of the United States opposing Dr. Meissner's Motion for Stay Without Bond Pending Appeal, p. 2 filed in No. 75-6007.

But in June 1975 the Government said:

"The Government had two objectives in bringing the summary proceedings: to gain knowledge about two safe deposit boxes and to obtain their contents, or so much as was leviabale." (emphasis added). Government's Memorandum of June 26, 1975, p. 9.

B. The Government Assertion Of Fugitive Status Is Contradicted By The Facts.

The Government advised this Court:

"He [Dr. Meissner] is in contempt of and in flight from the District Court's writ." Government's Memorandum of June 26, 1975, p. 10.

However, the District Court records clearly show that Dr. Meissner has not been held in contempt of Court. Nor has he fled from the United States at the time of or after the District Court's writ. He has been a non-resident of the United States since the middle of 1970 when he was employed

abroad, a fact known to and acknowledged by the Internal Revenue Service well before the jeopardy assessment was made in the case in April 1974.

C. The Government's Attempt At Distortion.

The Government advised this Court:

"The only documents found in this box [at the Chemical Bank] (on information and belief an appraisal of a painting and an empty envelope) were not seized but were taken into I.R.S. custody solely for the purpose of delivery to Meissner's counsel for ultimate return to his client." Government's Memorandum of June 26, 1975, p. 7.

Although the Government now tenders this purpose (for the first time), two and one-half months have elapsed since the Government seized the above personal documents from the safe deposit box. They have not yet been delivered to counsel for Dr. Meissner.

D. The Government Used Delay To Mislead.

Dr. Meissner timely filed his Notice of Appeal on March 26, 1975. On April 22, the Government forcibly entered and searched both safe deposit boxes. The facts upon which the Government now relies to support its arguments were known to the Government during the week of April 22, 1975. These

arguments are that the appeals are moot as the interim relief has been obtained, that Chemical Bank's compliance moots questions relating thereto, that the order affecting Citibank is not final, and that Dr. Meissner's appeals should be dismissed because of his alleged fugitive status. Nevertheless, the Government waited until June 26 to file this Motion causing Dr. Meissner's counsel (and counsel for Citibank) to expend extensive time, effort and costs to prepare and file a full brief on the merits on June 5.

E. The Government Misrepresents.

The Government has advised this Court:

"The District Court's denial of Meissner's motion to intervene, originally and as renewed, is immaterial for present purposes since it is abundantly clear from the record that Meissner does not intend to come forward and assert a claim of [constitutional] privilege himself, and answer pertinent questions of the court and counsel concerning the factual basis of the claim." (footnote omitted). Government's Memorandum of June 26, 1975, p. 25.

However, the Government has opposed Dr. Meissner's Motion to Intervene which would permit him to come forward and assert his privilege. In the proceedings in the District Court at Pittsburgh, involving a similar government petition to enter a safe deposit box at the Mellon Bank, Dr. Meissner, after being granted the right to intervene, did personally invoke his constitutional privileges.

CONCLUSION

For the foregoing reasons the Government's Motion to dismiss the instant appeals should be denied.

Respectfully submitted,

R. Kenly Webster
KENNEDY & WEBSTER
R. Kenly Webster
888 17th Street, N. W.
Washington, D. C. 20006

and

Neal J. Hurwitz
NEAL J. HURWITZ
745 Fifth Avenue
New York, New York 10022

Attorneys for Proposed Intervenor-
Appellant Milton F. Meissner

JULY 9, 1975

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached brief has been mailed, first class, postage prepaid to the Honorable Paul J. Curran, United States Attorney, U. S. Courthouse, Foley Square, New York, New York 10007, Attention: William R. Bronner; Matthew C. Gruskin, Esq., Shearman & Sterling, 53 Wall Street, New York, New York 10005; and to William A. Smith, Jr. Esq., John B. Wynne, 20 Pine Street, New York, New York 10005 this 9th day of July, 1975.

R. Kenly Webster

R. KENLY WEBSTER

